Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANK AMERMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34pp

QUESTION PRESENTED

I. When the government presents as its only evidence in support of an illegal manufacturing laboratory, disassembled equipment, which has been in storage for a lengthy period, along with only some of the precursor chemicals needed for making methamphetamine, absent any showing that said equipment and chemicals were intended, or capable, of manufacturing additional quantities of drugs, does it satisfy the "preponderance of evidence" standard so as to allow a Sentencing Court to increase a defendant's relevant conduct.

PARTIES BELOW

Petitioner, FRANK AMERMAN, *Defendant-Appellant.*

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

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IN THE

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OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Third Circuit Opinion which can be found in the Appendix at A1.

JURISDICTION

The Per Curium Opinions, of the United States Court of Appeals for the Third Circuit, dated and entered on November 17, 1993.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the United States Sentencing Guidelines, recites:

Section 2D1.1, Application Note 12 (Formerly §2D1.4, Application Note 1):

If a defendant is convicted of an offense involving negotiations to traffic in a controlled substance, the weight under negotiations in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing a negotiated amount, the Court shall exclude from the guidelines calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

In pertinent part, the United States Sentencing Guidelines, recites:

Section 2D1.1, Application Note 12 (Formerly §2D1.4, Application Note 2):

Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions and controlled substances by the Defendant, and the size or capability of any laboratory involved.

STATEMENT OF THE CASE

On January 8, 1993, Petitioner was indicted on the charge of *Conspiracy to Manufacture and Distribute Methamphetamine*, in violation of Title 21 U.S.C. 846.

On January 19, 1993, Petitioner pleaded not guilty to the Indictment. On January 25, 1993, Petitioner was found guilty, after a jury trial, of the offense charged in the Indictment.

Sentencing occurred on April 30, 1993, in the United States District Court for the Eastern District of Pennsylvania. Petitioner was sentenced to life imprisonment without parole and, if ever released, a subsequent term of five (5) years supervised release.

This case involved a conspiracy to manufacture and distribute methamphetamine. The conspiracy involved several individuals, however, the trial in question focused on codefendants Frank Amerman and Francis Joseph Walker. Several co-conspirators testified, pursuant to negotiated plea agreements on behalf of the Government, namely William Kelly and William Spotts. Kelly testified that he assisted Amerman, along with others, in the "cooking" of methamphetamine. Kelly specifically testified as to three (3) specific instances where he assisted in the manufacture of methamphetamine. Each occurred in the summer of 1988. On one occasion, Kelly testified, he assisted in the manufacture of 1.5 pounds of methamphetamine. The second occasion, Kelly testified, resulted in the production of 12 or 13 pounds of methamphetamine. Finally, on the third occasion, a minimum of 12 pounds of methamphetamine was produced.

William Spotts testified that he stored equipment and chemicals to be used in the manufacture of methamphetamine from the summer of 1988 until the time of the equipment's seizure in August of 1992. Spotts also testified that he purchased approximately 1.5 pounds of methamphetamine from Petitioner prior to 1988. Of further significance, Spotts testified that he provided a pound of methamphetamine to Petitioner during the time in which the lab and chemicals were stored in Spotts' garage. This indicates that Petitioner was not capable, nor had the intent, of manufacturing additional amounts of methamphetamine and was, therefore, forced to purchase methamphetamine from Spotts.

Also, a senior DEA forensic chemist testified that a minimum of 40 additional pounds of methamphetamine could be manufactured by using the 40 pounds of methylamine, 35 pounds of alcohol and bags of shredded aluminum, which was also seized along with the equipment.

At the Sentencing Hearing, the Court, based on trial evidence, held Petitioner responsible for an additional 40 pounds of methamphetamine. This decision was made in spite of facts showing that: (1) specific quantities were determinable; (2) the lab was unusable, being disassembled and in storage since the summer of 1988; (3) the disassembled laboratory was seized from Spotts' garage; and (4) there was no P_2P, a necessary ingredient in the making of methamphetamine, found with the equipment.

The result of the inclusion of the additional 40 pounds of methamphetamine was that it forced Petitioner's offence level over a Level 42. This being the case, Petitioner was sentenced to Life Imprisonment.

ARGUMENT

A. **The United States Court of Appeals for the Third Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court; And In So Doing, Also Rendered A Decision in Conflict With Decisions of Other Courts of Appeals on the Same Matter.**

The United States Court of Appeals for the Third Circuit has rendered a decision that is squarely in conflict with the below listed decisions of other Circuits. On the issue of increasing a defendant's relevant conduct, and thereby his sentence, through the addition of drug quantities which were neither intended to be produced, nor capable of being produced by the defendant:

(1) 5th Circuit (1989): *United States v. Garcia*, 889 F.2d 1454;

(2) 1st Circuit (1990): *United States v. Bradley*, 917 F.2d 601;

(3) 7th Circuit (1990): *United States v. Buggs*, 904 F.2d 1070;

(4) 1st Circuit (1991): *United States v. Estrada-Molina*, 931 F.2d 964;

(5) 6th Circuit (1991): *United States v. Christian*, 942 F.2d 363;

(6) 6th Circuit (1991): *United States v. Gonzalez*, 929 F.2d 213.

This issue, as to a defendant being "reasonably capable of producing", has not been previously addressed by this Honorable Court. In the present case, the sentencing court was clearly erroneous when it held that the additional 40-pound quantity was a part of Petitioner's relevant conduct. The record is devoid of evidence showing that Petitioner intended, or had the capacity, to manufacture additional quantities of methamphetamine. In fact, the record establishes that Petitioner did not have the requisite intent and capability, in that, there was an absence of the necessary ingredients to manufacture the drug and the lab had been disassembled and in storage for a period of in excess of three (3) years. Additionally, necessary chemicals were lacking to complete the methamphetamine process.

Petitioner respectfully urges acceptance of review by this Honorable Court, on certiorari, to consider and determine whether the Sentencing Court was erroneous in attributing an additional 40 pounds of methamphetamine, given the facts that such a projected output was to come from a lab which had been disassembled, and in storage, for approximately three years and in the absence of primary ingredients, specifically, the chemical P_2P. From this evidence, Petitioner clearly did not intend to produce additional quantities of methamphetamine. It is also clear that Petitioner was, in no way, capable of producing any additional methamphetamine, let alone the aforementioned quantity.

Furthermore, this Honorable Court, in considering the above issues, is respectfully directed to:

United States v. Ruiz, 932 F.2d 1174 (7th Cir.),***cert. denied***, 112 S.Ct. 151 (1991);

United States v. Jacobo, 934 F.2d 411 (2d Cir. 1991);

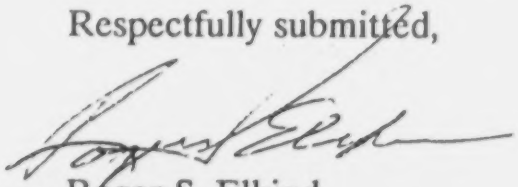
United States v. Brooks, 957 F.2d 1138 (4th Cir. 1992).

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

Petitioner had neither the intent nor capability to produce additional quantities of methamphetamine by or through the use of the disassembled lab which was stored in the garage of co-conspirator Spotts. Necessary chemicals were not present, and Petitioner lacked the ability to obtain them. Therefore, it is submitted that the additional 40 pounds of methamphetamine was erroneously included in Petitioner's relevant conduct calculations, resulting in a term of life imprisonment. Because of the lack of intent and capability, Petitioner should have the 40-pounds of additional methamphetamine removed from his relevant conduct calculation, then be awarded a new sentence based on the appropriate factors of his case.

Respectfully submitted,



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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed November 17, 1993)

Case Number: 93-1471

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK AMERMAN,

Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. NO. 92-00498-02
DISTRICT JUDGE: HON. JOSEPH L. McGLYNN

Submitted Under Third Circuit LAR 34.1(a) November 9, 1993.

BEFORE: GREENBERG, COWEN, and ROSENN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on November 9, 1993.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court filed May 3, 1993, be and the same is hereby affirmed.

Attest:

_____

P. Douglas Sisk, Clerk

Dated: Nov. 17, 1993

JUDGEMENT OF THE UNITED STATES DISTRICT COURT

(Filed April 30, 1993)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

FRANK AMERMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 2:92CR00498-2

Edward Reif
Defendant's Attorney

THE DEFENDANT:

( ) pleaded guilty to count(s)_____

( ) pleaded nolo contendere to count(s)_____
which (was) (were) accepted by the court.

(xx) was found guilty on count(s) 1
after a plea of not guilty.

Title/Sect	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
USC 846	*Conspiracy to manufacture and distribute methamphetamine.*	*08/13/92*	*1*

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 163-32-5197
Defendant's Date of Birth: 06/06/40

Defendant's Mailing Address:

FCI Schuylkill
P. O. Box 700
Minersville, PA 17954

Defendant's Residence Address:

25 Welsh Road
F. T. C.
Philadelphia, PA 19114

Defendant
Edward Reif, Esq., Defense Counsel
Barbara L. Miller, AUSA
Thomas Hunt - Probation (2)
U. S. Marshal (2)
Pretrial (2)

04/30/93
Date of Imposition of Judgment

Signature of Judicial Officer

JOSEPH L. MCGLYNN, JR.
JUDGE USDC EDPA
Name & Title of Judicial Officer

04/30/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life.

life on Count(s): 1

The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
- [ ] at _____ a.m./p.m. on _____.
- [ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- [ ] before 2:00 p.m. on _____.
- [ ] As notified by the United States Marshal.
- [ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL
By:_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years.

5 years as to Count(s): 1

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposed a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this judgment. The defendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with these conditions.

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	*Assessment*	*Fine*	*Restitution*
1	$ 50.00	$ 0.00	$ 0.00
TOTALS:	$ 50.00	0.00	0.00

FINE

The fine includes any costs of incarceration and/or supervision.

The court has determined that the defendant does not have the ability to pay interest in full.

It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

Such restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	*Amount of Restitution*	*Priority Order of Payment*

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[xx] in full immediately.

[ ] in full not later than _____.

[ ] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $____ over a period of__ months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

Financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to U.S.C. §3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

OR

The Court adopts the factual findings and guideline application in the presentence report except

Court finds a four level enhancement for leadership. Base Offense Level 46.

Guideline Range Determined by the Court:

Total Offense Level: 46
Criminal History Category: I
Imprisonment Range: _____ to LIFE months and _____ months consecutive.
Supervised Release Range: _____ to 5 years
Fine Range: $25,000.00 to $4,000,000.00

[X] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

United States Sentencing Commission.
Level 46 Life Imprisonment.

OR

The sentence departs from the guideline range _____ upon motion of the government, as a result of defendant's substantial assistance.
_____ for the following reason(s):

TRANSCRIPT OF SENTENCING HEARING

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 92-498-02

UNITED STATES OF AMERICA,

v.

FRANK AMERMAN,

Philadelphia, Pennsylvania
April 30, 1993

BEFORE: THE HON. JOSEPH L. MC GLYNN, JR., S.J.

SENTENCING

David S. Ehrlich, CSR
Official Court Reporter
Room 2722
U.S. Courthouse
Philadelphia, PA 19106
(215) 925-2319

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription (CAT).

APPEARANCES:

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Counsel for the Government

EDWARD REIF, ESQ.
1760 Market Street
Suite 1100
Philadelphia, PA 19103

Counsel for the Defendant

(Beginning on Page 33, Line 7)

MR. REIF: First of all, Judge, with respect to page 93 of the guidelines, which is what the government asked you to accept for purposes of the methamphetamine that was found in the garage and the other items, I don't have a case, but reading this -- and she is alluding to paragraph 3:

"An offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."

So what we are talking about, I perceive that that guideline has got to do where somebody says I'm going to sell you -- usually at the behest of the government, where they say we want to buy 20 kilos, and they produce 3 or 5 and then the government argues at the time of sentencing, well, they intended to sell them 20. That is what I perceive that to be. That doesn't say anything at all about the issue in this case as far as what was in the garage.

Secondly, you have to find under any circumstances that there was an ability of Mr. Amerman to convert what was in the garage into methamphetamine. And it seems to me where you have a 3-year hiatus, according to Spotts, where nothing was done, the rent wasn't paid and there was no evidence of that on Spotts' testimony -- and you can believe or disbelieve whatever portion of it you want -- where he says Amerman sold him a pound and-a-half of methamphetamine, he also said that he sold Amerman a pound.

Now, if someone has the ability to produce 120 pounds of methamphetamine, it certainly would be a lot cheaper for him to do that than to buy a pound from a person that he allegedly was supplying himself.

So I don't think that her argument cuts water as far as -- and more importantly, my argument is the same, and that is that there was not -- that in that garage you could not manufacture methamphetamine with what was in there. And page 93 paragraph 3 doesn't address that particular scenario.

More importantly, I don't know if I have to, if the court wants case law on it, but if Miss Miller is suggesting that if the Court believes that everything that occurred as far as Mr. Amerman was concerned occurred in 1988, that you have to accept the guidelines in effect today at the time of sentencing, I mean, that is Hornbook law. And if you want a couple of cases, I have some cases that say that. They are 1992 and 1993 cases. But the guidelines also say it, that where the penalty is more stringent at the time of sentencing at the time the crime was committed, you have to go by the guidelines in effect at the time the crime was committed. Otherwise, what would we mean by ex post facto laws? Now, if you want a couple of citations on that, I will be happy to provide --

THE COURT: I don't need any citations, but I don't think you are addressing the argument that the government is making, that this is a conspiracy charge, it takes into account the manufacturing of methamphetamine from 1987 right on through 1992 when the conspiracy ended, when the --

MR. REIF: Okay. It is true that that is what Mr. Amerman was indicted for. But you have to make a finding, it seems to me, that in fact Mr. Amerman was involved during that entire period of time. I mean, there is evidence in this record to show that at some point Mr. Walker went his own way. He was involved with Kelly in separate transactions, he was involved in purchasing some material that Kelly used in a different type of methamphetamine manufacturing.

My argument is that if you believe that the evidence showed that Mr. Amerman was involved in this conspiracy, he don't have to be involved from the time that the conspiracy started until the time that it ended. It seems to me that the law is pretty clear today that he is responsible for only those things that occurred during his involvement in the conspiracy.

I say that based upon the credible evidence that you have, that there was nothing else done after 1988 by Mr. Amerman. And if that is the case and if you accept that, fine.

The government is saying that the 40 pounds -- I mean, they are not attributing to Mr. Amerman what Walker did with Kelly as far as manufacturing with this new process. So what they are saying is, in addition to these three cooks testified to by Kelly, that we want you to use in determining the appropriate figure what was found in Spotts' garage. And I say you shouldn't use it --

I mean, I can go around in circles, but I think you understand my argument. I mean, they are not saying -- there certainly was testimony that Mr. Walker was involved over and above Mr. Amerman with Kelly later on where Amerman's name never surfaced. They didn't argue to you that because this was a continuing conspiracy, that Mr. Amerman was involved with that, or whatever was manufactured or attempted to be manufactured by Kelly and Walker in 1991 when he purchased these things. There was testimony about certain chemicals being shipped, that Amerman was responsible for that.

And for whatever it is worth, the government didn't file any objections to the government's -- to the presentence investigation. Now they say, well, we disagree with the Probation Department because we want you to add in a pound and-a-half more.

I was under the impression that under the rules of this Court, that if you don't object to it, you are stuck with it.

THE COURT: Okay.

MS. MILLER: Your Honor, I hate to repeat myself, but I guess I need to. There was no 3-year hiatus. Mr. Amerman's active involvement in the conspiracy and his own actions continued through 1992; through 1991, as Mr. Spotts testified, he continued to sell methamphetamine to Mr. Spotts. Right down to the day of the seizure, Mr. Spotts was trying to get him to remove the chemicals and he would not. He was safeguarding them with the intent and the capability of producing future methamphetamine. The guidelines allow and require the Court to consider that.

Very briefly, one paragraph I failed to read to Your Honor -- we are still on page 92, 2D1.1, note 12 of the guidelines, the very first paragraph of that note states that, "Even where there is no drug seizure, or the amount seized does not reflect the scale of the offense, the Court shall approximate the quantity of the controlled substance," and lists several factors that the Court may consider in making a determination, the last but not least of which is, at the bottom of that paragraph: "The size and capability of any laboratory involved."

Your Honor, that does not necessarily mean an operational methamphetamine laboratory that just needs a flip of an electrical switch to start. It means a storage area also. That, the government respectfully submits, requires the Court to include the 40 pounds of pure methamphetamine and the fact that Mr. Amerman was guarding that as carefully as he could right into August of 1992.

THE COURT: All right. I will take the last thing first.

My conclusion is that under the law and the facts as I heard them at the trial, is that this is covered by the guidelines, the 40 pounds estimated by the -- the 40 to 120 pounds estimated by the chemist should be included in the calculations of the amount of substance involved.

Because this was a conspiracy count, the conspiracy did not conclude until such time as the arrests were made, and the property and the chemicals were seized, and the equipment was seized. That was in 1992. Therefore, we will apply the current, or at least the guidelines in existence as of 1992.

And it brings us to a 30.39 kilos, which is a 42 level, right?

MS. MILLER: Yes, sir.

THE COURT: Over 30 is level 42.